

ESTTA Tracking number: **ESTTA407027**

Filing date: **05/04/2011**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following parties oppose registration of the indicated application.

Opposers Information

Name	BOUNCING BEAR BOTANICALS, INC.
Granted to Date of previous extension	05/08/2011
Address	PO BOX 1993 LAWRENCE, KS 66044 UNITED STATES

Name	BRADMILLER
Granted to Date of previous extension	05/08/2011
Address	2105 MEADOW RIDGE DR INNSBROOK, MO 63390 UNITED STATES

Attorney information	REBECCA WEMPE STEVENS & BRAND, LLP 900 MASSACHUSETTS STE 500 LAWRENCE, KS 66044 UNITED STATES RWEMPE@STEVENSBRAND.COM Phone:785-843-0811
----------------------	---

Applicant Information

Application No	85057245	Publication date	11/09/2010
Opposition Filing Date	05/04/2011	Opposition Period Ends	05/08/2011
Applicant	KTW ENTERPRISES, LTD PO BOX 19149 Portland, OR 97280 UNITED STATES		

Goods/Services Affected by Opposition


Class 003. First Use: 2009/03/27 First Use In Commerce: 2009/03/27
All goods and services in the class are opposed, namely: Incense

Grounds for Opposition

Deceptiveness	Trademark Act section 2(a)
False suggestion of a connection	Trademark Act section 2(a)
Priority and likelihood of confusion	Trademark Act section 2(d)

Dilution	Trademark Act section 43(c)
<i>Torres v. Cantine Torresella S.r.l.Fraud</i>	808 F.2d 46, 1 USPQ2d 1483 (Fed. Cir. 1986)

Mark Cited by Opposer as Basis for Opposition

U.S. Application No.	85101704	Application Date	08/06/2010
Registration Date	NONE	Foreign Priority Date	NONE
Word Mark	K2		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 003. First use: First Use: 2009/03/31 First Use In Commerce: 2009/03/31 Incense		

Related Proceedings	CIVIL ACTION FILED 11/10/2010 IN U.S. DISTRICT COURT FOR THE DISTRICT OF KS, CASE NO. 10-CV-4138-KHV-KMH
---------------------	--

Attachments	85101704#TMSN.jpeg (1 page)(bytes) DOC050411-1.pdf (5 pages)(332780 bytes)
-------------	--

Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/REBECCA WEMPE/
Name	REBECCA WEMPE
Date	05/04/2011

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD
Serial No. 85/057,245

BOUNCING BEAR BOTANICALS, INC.)	
AND BRAD MILLER,)	
)	
vs.)	Opposition No. _____
)	
KTW ENTERPRISES, LTD.,)	Notice of Opposition
)	
)	
_____)	

Opposers Bouncing Bear Botanicals, Inc., a Kansas corporation with a business address of PO Box 1993, Lawrence, Kansas, 66044, and Brad Miller, an individual, with an address of 2105 Meadow Ridge Dr., Innsbrook, Missouri, 63390, hereby oppose registration of the mark K2 that is the subject of application Serial No. 85/057,245, published November 9, 2010 in International Class 3.

As grounds in support of their opposition, Opposers assert the following:

1. Opposers began using the mark K2 in commerce as a trademark for incense in March 2009.
2. Opposers began using the mark K2 for incense before Applicant began using the mark K2 for incense.
3. Opposers began using the mark K2 for incense before any predecessor in title of Applicant began using the mark K2 for incense.
4. On June 8, 2010, Applicant filed Application Serial No. 85/057,245 to register the mark K2 for incense in International Class 3.
5. Applicant's application to register the mark K2 contains fraudulent misrepresentations regarding material facts, made with the knowledge that the representations were false and with the intent to deceive.

6. Applicant's application to register the mark K2 claimed, among other things, that Applicant was believed to be the owner of the mark K2, that Applicant was believed to be entitled to use such mark in commerce, and that no other person was believed to have the right to use the mark in commerce.

7. Applicant's application to register the mark K2 asserted that the mark was used in commerce at least as early as March 27, 2009, which was prior to Applicant's incorporation on February 2, 2010.

8. Applicant did not state in its application to register the mark K2 that first use was by any predecessor in title. 37 C.F.R. § 2.38(a).

9. Applicant is not (and was not, at the time of the filing of its application for registration) the rightful owner of the mark K2.

10. Opposers, since prior to any date upon which Applicant can rely, adopted and have continuously used the mark K2 in commerce as a trademark for incense.

11. On August 6, 2010, Opposers filed Application Serial No. 85/101,704 to register the mark K2 for incense in International Class 3.

12. On November 10, 2010, Opposers filed in the United States District Court for the District of Kansas an action against Applicant and others regarding Opposers' rights in the mark K2 (Case No. 10-CV-4138-KHV-KMH) (the "Civil Action"). The Civil Action asserted against Applicant, among other claims, claims for unfair competition and false advertising under 15 U.S.C. § 1125(a), trademark dilution under 15 U.S.C. § 1125(c), and trademark cyberpiracy in violation of 15 U.S.C. § 1125(d).

13. Applicant filed a Counterclaim in the Civil Action alleging that an entity known as Inca Tea originally owned the mark K2, and that Inca Tea conveyed its rights to the mark to Ryan Scott on July 14, 2010. (Civil Action, Doc. 49, at 9.)

14. Applicant has not alleged in the Civil Action that Ryan Scott or Inca Tea conveyed the rights to the mark K2 to Applicant.

15. Applicant has admitted in its responses to requests for admission in the Civil Action that Applicant's asserted rights to the mark K2 arise exclusively through a purported assignment from Inca Tea.

16. Applicant filed its application to register the mark K2 on June 8, 2010, which was prior to the purported assignment from Inca Tea to Ryan Scott on July 14, 2010.

17. On November 27, 2010, the United States Patent and Trademark Office issued an office action on Opposers' Application Serial No. 85/101,704 stating that there may be a likelihood of confusion under 15 U.S.C. § 1152(d) between Opposers' mark K2 and the mark K2 sought to be registered by Applicant.

18. The mark K2 shown by Application Serial No. 85/057,245, when used in association with incense, so resembles Opposers' mark K2 previously used by Opposers, which mark is also used for incense, and which mark is used in the same channels of trade and with the same classes of purchasers as Applicant's mark, as to be likely to cause confusion, or to cause mistake, or to deceive within the meaning of 15 U.S.C. § 1052(d).

19. As a result of Opposers' long-term, substantial and widespread use of the mark K2, the mark K2 has become famous, and is thus a valuable symbol that serves to identify Opposers as the source of all incense identified by or promoted with the mark.

20. The mark K2 previously used by Opposers became famous prior to any date upon which Applicant can show use of the mark K2.

21. The mark K2 shown by Application Serial No. 85/057,245 so resembles Opposers' famous mark K2 previously used by Opposers as to be likely to falsely suggest a connection between Opposers and Applicant in violation of 15 U.S.C. § 1052(a).

22. The mark K2 shown by Application Serial No. 85/057,245 when used in association with Applicant's goods renders the mark matter which may disparage Opposers because the mark so resembles Opposers' famous mark K2 previously used by Opposers in violation of 15 U.S.C. § 1052(a).

23. The mark K2 shown by Application Serial No. 85/057,245 so resembles Opposers' famous mark K2 that when used by Applicant, said use is likely to cause dilution of the distinctive quality of Opposers' mark K2 in violation of 15 U.S.C. § 1125(c).

24. The mark K2 shown by Application Serial No. 85/057,245 so resembles Opposers' famous mark K2 when used in association with the goods of Applicant as to be likely to cause dilution by tarnishment harming the reputation of Opposers' mark K2 in violation of 15 U.S.C. § 1125(c).

25. Opposers will be damaged by the registration sought by Applicant in that the registration will be prima facie evidence of the validity of the registration, Applicant's ownership of the mark K2, and Applicant's exclusive right to use the mark K2 in association with incense when, in fact, Applicant is not entitled to such rights by virtue of Opposers' prior and continuous use of the mark K2 in association with the sale of incense.

26. WHEREFORE, Opposers pray that the opposition be sustained and that registration be refused.

Respectfully submitted,

BOUNCING BEAR BOTANICALS, INC.
BRAD MILLER

By: Rebecca J. Wempe
/s/ Rebecca J. Wempe
STEVENS & BRAND, L.L.P.
900 Massachusetts St., Ste. 500
P. O. Box 189
Lawrence, KS 66044-0189
(785) 843-0811 – Phone
(785) 843-0341 – Fax
rwempe@stevensbrand.com
Attorneys for Opposers

CERTIFICATE OF FILING AND SERVICE

I hereby certify that I electronically filed the foregoing this 4th day of May, 2011, with the Trademark Trial and Appeal Board using the ESTTA filing system of the U.S. Patent and Trademark Office.

I hereby certify that I duly served the foregoing this 4th day of May, 2011 upon the Applicant and Applicant's Attorney of Record by mailing a copy thereof via the U.S. Postal Service in a sealed envelope as first-class mail, postage prepaid, addressed to:

KTW Enterprises, Ltd.
PO Box 19149
Portland, OR 97280

Leonard D. DuBoff
The DuBoff Law Group
6665 SW Hampton St. Ste 200
Portland, OR 97223

/s/ Rebecca J. Wempe
Rebecca J. Wempe